STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Owens, Shapiro and Jansen

MICHAEL LEGO and
PAMELA LEGO,

Plaintiffs-Appellees,

vs.

MSP DETECTIVE SPECIALIST JAKE LISS,
in his individual capacity only,

Defendant-Appellant.

Supreme Court No. 149247
Court of Appeals No. 312392
Wayne Circ. Ct. No.12-7085-NO

BRIEF ON APPEAL OF PLAINTIFFS-APPELLEES

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

On May 8, 2014, Defendant-Appellant filed an application with this Court, seeking leave to appeal that portion of the Michigan Court of Appeals' March 27, 2014 opinion which affirmed the trial court's denial of Defendant's summary disposition motion based on M.C.L. §600.2966. On December 22, 2014, this Court issued an order granting the application. Consequently, this Court has jurisdiction over the instant appeal pursuant to MCR §7.301(2)

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is a governmental defendant's mental state or level of culpability relevant to determining what constitutes normal, inherent and foreseeable risks of a firefighter's or police officer's profession under MCL 600.2966?

2. Is Trooper Liss' alleged violation of numerous departmental safety procedures relevant to determining whether the shooting in this case was one of the normal, inherent and foreseeable risks of Detective Lego's profession?

STATUTES INVOLVED

MCL 600.2965 Recovery of damages by firefighter or police officer; preclusion abolished.

Sec. 2965.

The common law doctrine that precludes a firefighter or police officer from recovering damages for injuries arising from the normal, inherent, and foreseeable risks of his or her profession is abolished.

MCL 600.2966 Injury to firefighter or police officer; governmental immunity.

Sec. 2966.

The state, a political subdivision of this state, or a governmental agency, governmental officer or employee, volunteer acting on behalf of a government, and member of a governmentally created board, council, commission, or task force are immune from tort liability for an injury to a firefighter or police officer that arises from the normal, inherent, and foreseeable risks of the firefighter's or police officer's profession. This section shall not be construed to affect an individual's rights to benefits provided under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941.

MCL 600.2967 Recovery of damages by firefighter or police officer; circumstances as proof; construction of section; definitions.

Sec. 2967.

(1) Except as provided in section 2966, a firefighter or police officer who seeks to recover damages for injury or death arising from the normal, inherent, and foreseeable risks of his or her profession while acting in his or her official capacity must prove that 1 or more of the following circumstances are present:

(a) An injury or resulting death that is a basis for the cause of action was caused by a person's conduct and that conduct is 1 or more of the following:

(i) Grossly negligent.

(ii) Wanton.

(iii) Willful.

(iv) Intentional.

(v) Conduct that results in a conviction, guilty plea, or plea of no contest to a crime under state or federal law, or a local criminal ordinance that substantially corresponds to a crime under state law.

(b) The cause of action is a product liability action that is based on firefighting or police officer equipment that failed while it was being used by the firefighter or police officer during the legally required or authorized duties of the profession, which duties were performed during an emergency situation and which duties substantially increased the likelihood of the resulting death or injury, and all of the following are true:

(i) The negligent person is not someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred; or the person is someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred and the action is based on an act by that person that occurred after the firefighter or police officer arrived at the place where the injury occurred.

(ii) The negligent person is not someone from whom the firefighter or police officer had sought or obtained assistance or is not an owner or tenant of the property from where the firefighter or police officer sought or obtained assistance.

(iii) The negligent person is not someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity; or the person is someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity and the action is based on an act by that person that occurred after the firefighter or police officer arrived at the place where the injury occurred.

(c) An injury or resulting death that is a basis for the cause of action was caused by a person's ordinary negligence and all of the following are true:

(i) The negligent person is not someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred; or the person is someone whose act or omission resulted in the firefighter's or police officer's presence at the place where the injury occurred and the action is based on an act by that person that occurred after the firefighter or police officer arrived at the place where the injury occurred.

(ii) The negligent person is not someone from whom the firefighter or police officer had sought or obtained assistance or is not an owner or tenant of the property from where the firefighter or police officer sought or obtained assistance.

(iii) The negligent person is not someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her official capacity; or the person is someone who is an owner or tenant of the property that the firefighter or police officer was on in his or her

official capacity and the action is based on an act by that person that occurred after the firefighter or police officer arrived at the place where the injury occurred.

(iv) The firefighter or police officer was engaged in 1 or more of the following:

(A) Operating, or riding in or on, a motor vehicle that is being operated in conformity with the laws applicable to the general public.

(B) An act involving the legally required or authorized duties of the profession that did not substantially increase the likelihood of the resulting death or injury. The court shall not consider the firefighter or police officer to have been engaged in an act that substantially increased the likelihood of death or injury if the injury occurred within a highway right-of-way, if there was emergency lighting activated at the scene, and if the firefighter or police officer was engaged in emergency medical services, accessing a fire hydrant, traffic control, motorist assistance, or a traffic stop for a possible violation of law.

(2) This section shall not be construed to affect a right, remedy, procedure, or limitation of action that is otherwise provided by statute or common law.

(3) As used in this section:

(a) “Grossly negligent” means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

(b) “Person” means an individual or a partnership, corporation, limited liability company, association, or other legal entity.

(c) “Product liability action” means that term as defined in section 2945.

I. INTRODUCTION

This is an action for gross negligence and loss of consortium brought by Plaintiffs-Appellees Michael Lego ("Lego"; "Detective Lego") and his wife, Pamela Lego, against Defendant-Appellant Jake Liss ("Liss"). At the time of the events in this case, Detective Lego was a Plymouth Township police officer, assigned to a highly-trained, multi-jurisdictional Community Response Team ("CRT") on task force. Liss was a Michigan State Police trooper assigned to a separate task force that was assisting Detective Lego's unit in apprehending an armed robbery suspect outside a mobile phone store.

During the suspect's apprehension, Liss inexplicably committed numerous, egregious violations of departmental safety procedures, including leaving his position and improperly inserting himself in a formation behind Detective Lego. When the armed robber exited the mobile phone store, Detective Lego shot and killed him when he failed to surrender and raised his gun to fire at Lego. Liss fired his weapon without making certain that Detective Lego was out of his line of fire striking Lego in the back, seriously wounding him. Liss, after shooting Lego in the back, stepped around Lego and continued firing wildly at the suspect, who was lying mortally wounded on the ground. Detective Lego sued Liss alleging that, due to a reckless desire to get in on the action and to get some "trigger time", Liss disregarded the task forces' specialized training, resulting in his shooting and severely wounding Detective Lego.

As discussed more fully below, applying the Firefighter's Rule to bar Lego's claim is inappropriate. The Firefighter's Rule precludes recovery against governmental actors for conduct that is within the normal, inherent and foreseeable risks of a safety officer's work. Liss' conduct was grossly negligent and in complete contravention of the task forces' specialized and extensive training. The fact that Liss' conduct constituted gross negligence does not *per se* establish that

the conduct was outside the normal, inherent and foreseeable risks. But conduct that is at least grossly negligent is almost always outside the normal, inherent and foreseeable risks, because the conduct exposes safety officers to dangerous situations that exceed what they are trained for and should be expected to handle. Officers, especially those making high risk entries and apprehensions, are trained to expect possible assaultive conduct from criminal suspects but they are not trained to defend against being shot in the back by a fellow officer. Liss' actions were so far outside proper police practice they could not have been reasonably anticipated by Detective Lego or any other reasonable police officer, and therefore were not within the normal, inherent and foreseeable risks of Lego's work. The policy underlying the Firefighter's Rule is not promoted by applying the Rule to preclude Lego from recovering for the risks presented in this situation.

II. COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Detective Lego began employment as a police officer with the Plymouth Township Police Department in 1993. Lego was promoted to the rank of Detective Specialist. Beginning in 2008, Lego was assigned to the Western Wayne Community Response Team, or CRT. CRT is comprised of detectives from Plymouth Township, Northville Township, Canton Township, Wayne County Sheriff, and Michigan State Police troopers. CRT's primary responsibilities include investigation of armed robberies and other violent crimes in western Wayne County, surveillance of subjects suspected of involvement in those crimes and the apprehension of criminals once sufficient evidence of their guilt has been developed.

CRT is one of three separate task forces which operate under the direction of an "umbrella" agency, the Western Wayne Criminal Investigation Bureau. The other two task forces are Western Wayne Narcotics ("WWN") and Western Wayne Auto Theft. WWN was formed for

the purpose of enforcing narcotics and/or controlled substance laws and investigating drug-related criminal activity. At the time of the incident in this case, Defendant Liss was a Michigan State Police trooper assigned to the WWN task force (Complaint, ¶¶ 6-12; Appendix Page Nos. 2a-3a).

Officers assigned to the three task forces receive specialized and intensive SWAT-type training because they are often called upon to perform high risk operations such as raids, high risk building entries and take downs of vehicles involving possibly armed and violent suspects. Officers assigned to the task forces are also trained and authorized to use specialized weapons such as M-4's and AR-15 assault rifles. Because the CRT, WWN and Auto Theft task forces each has a relatively small number of officers assigned to it, officers from one task force are sometimes directed by their supervisors to assist one of the other task forces (Complaint, ¶¶ 9-11; Appendix Page Nos. 2a-3a).

In October 2009, Lego and the other CRT detectives began investigating a series of armed robberies committed in and around Canton, Michigan. CRT's investigation developed information that an individual by the name of Lebron Bronson was the person committing the robberies. The investigation revealed that Bronson had an extensive and violent criminal history, including numerous armed robberies. For several days, CRT conducted surveillance of Bronson, following him as he drove to various locations. At the direction of the Western Wayne Criminal Investigation Bureau Commander, members of the WWN drug task force, including Defendant Liss, joined CRT in the Bronson surveillance (Complaint, ¶15; Appendix Page No. 3a).

On October 29, 2009, CRT, along with members of WWN, followed Bronson to the parking lot of a strip mall center in Plymouth Township containing various retail establishments, including a Verizon Wireless store. It was apparent to the officers that Bronson was about to rob

one of the stores. After Bronson left his car carrying a hand gun and entered the Verizon store, Detective Lego and two other officers positioned themselves in a stacking formation (i.e., one behind the other) against the wall of the building adjacent to the entrance of the Verizon store. Officer Lego, acting as point man, was armed with an M-4 assault rifle and was closest in line to the Verizon store's entrance (Complaint, ¶18; Appendix Page No. 4a).

Defendant Liss arrived at the parking lot in his police vehicle a short time later. Lego and the other two officers had the Verizon store's entrance/exit covered, and additional officers had the only other store exit covered and were relaying information by radio. Liss, in accordance with his training and proper tactics, should have remained in his vehicle to block Bronson's escape if Bronson unexpectedly returned to his vehicle (Complaint, ¶20; Appendix Page No. 4a). However, instead of remaining in his vehicle, and apparently motivated by a desire to "get in on the action," Liss disregarded proper tactics and unexpectedly exited his vehicle carrying an AR-15 assault rifle; Liss ran up to Lego and the other two officers lined up against the side of the building without being instructed to do so, inserting himself between Lego and the two officers behind Lego (Complaint, ¶20; Appendix Page No. 4a). After Liss positioned himself behind Detective Lego, he continued to violate proper protocol by failing to follow the safety techniques he had been taught, including making body contact with the officer in front of him when in a stacking formation, keeping his weapon's muzzle pointed in a safe direction and keeping his finger off the trigger and outside the trigger guard until necessary to engage the target (Complaint, ¶21; Appendix Page Nos. 4a-5a).

At that point, Bronson suddenly exited the Verizon store still holding a handgun. Detective Lego, who was the closest officer to Bronson, identified himself as a police officer and ordered Bronson to drop his weapon. Bronson ignored Lego's commands and instead raised his

gun and pointed it at Lego, whereupon Lego fired two rounds from his rifle striking Bronson twice in the chest, causing Bronson to drop his pistol and fall to the ground mortally wounded, (Complaint, ¶23; Appendix Page No. 5a).

As Detective Lego fired his weapon, Liss discharged his weapon without ensuring that Detective Lego was clear of his line of fire. The round from Liss's rifle struck Lego in the back of Lego's right shoulder. The round exited the front of Lego's shoulder, struck Lego's weapon, then struck Lego in both hands and then penetrated the left front fender of the suspect's vehicle (Complaint, ¶24; Appendix Page No. 5a). Despite the fact that Bronson lay on the ground mortally wounded with his gun lying on the asphalt, Liss, now standing on Lego's right side approximately 6 feet away from Bronson, wildly fired 2 more rounds at Bronson. Neither round struck Bronson; instead, they struck the asphalt pavement near Bronson and ricocheted through the air, endangering the other officers and civilians in the area (Complaint, ¶25; Appendix Page No. 5a).

As the result of being shot by by Liss, Detective Lego sustained serious injuries; two of the fingers on his left hand were shattered and had to be amputated. Because of nerve damage Lego remains in almost constant pain. He is no longer physically or psychologically capable of working as a police officer. He continues to suffer psychologically and is unable to perform any work.

On September 2, 2011, Detective Lego and his wife filed a lawsuit against Liss and two of his supervisors in the U.S. District Court for the Eastern District of Michigan for violation of 42 U.S.C. §1983 and state law claims for gross negligence and loss of consortium (U.S. Dist. E.D. Mich. Case No. 11-13834). On February 3, 2012, the district court dismissed the federal claims pursuant to the defendants' summary judgment motion, and declined to exercise supplemental

jurisdiction over Mr. and Mrs. Lego's state law claims.

On May 24, 2012, the Legos filed the instant lawsuit against Liss only, stating claims for gross negligence and loss of consortium. On July 3, 2012, in lieu of answering the Complaint, Liss filed a motion for summary disposition (State Case Defendant's Motion for Summary Disposition dated July 3, 2012; Appendix Page No. 59a). Liss' motion claimed that Detective Lego's gross negligence claim was barred by the Michigan Firefighter's Rule, M.C.L. §600.2965 *et seq*. (the "Firefighter's Rule"), and the Michigan Worker's Disability Compensation Act, M.C.L. §418.101 *et seq*. On August 9, 2012, Lego filed a response opposing Liss' motion (Plaintiffs' Response Brief Opposing Defendant's Motion for Summary Disposition dated August 9, 2012; Appendix Page No. 1b).

On August 16, 2012, the trial court, Judge John H. Gillis, Jr., presiding, held oral argument on Liss' motion. Judge Gillis ruled from the bench and denied summary disposition as to both issues raised in Liss' motion. With respect to the Firefighter's Rule, Judge Gillis noted that, as alleged in the Complaint, Liss inserted himself in line behind Detective Lego and the other task force officers after the officers were already in position to apprehend the armed robber, then shot Detective Lego and continued to shoot at Bronson as he lay incapacitated on the ground after being shot by Detective Lego. The Judge ruled that application of the Firefighter's Rule was precluded because a question of fact existed on the issue of whether Liss' conduct implicated the Firefighter's Rule:

> "JUDGE GILLIS: Okay. In this case, [Lego] shot the armed robber as he came out of the Verizon store and he was on the ground dead when [Liss] shot at the armed robber and accidentally hit [Lego] in this case. I think there's a question of fact on the gross negligence issue because the person was already on the ground, number one; and number two, the Plymouth Township Police were already in line to apprehend the man when he came out of the store and [Liss] came up later. So, the Court will deny [Liss' summary disposition]

> motion." (Transcript of Motion for Summary Disposition Hearing dated August 16, 2012, pp. 7-8; Appendix Page Nos. 23b-24b)

On August 28, 2012, Judge Gillis entered a written order denying Liss' motion (State Case Order Denying Defendant's Motion for Summary Disposition; Appendix Page No. 74a).

On September 18, 2012, Liss filed a claim of appeal of right with the Court of Appeals with respect to the trial court's denial of summary disposition on the Firefighter's Rule issue (COA Case No. 312392). On the same date, Liss filed an application with the Court of Appeals seeking leave to appeal the trial court's denial of summary disposition on the Disability Compensation Act issue (COA Case No. 312406). The Court of Appeals granted the application and consolidated that matter with the appeal of right on the Firefighter's Rule.

On March 27, 2014, the Court of Appeals issued a written opinion denying Liss' appeal (Michigan Court of Appeals Opinion dated March 27, 2014; Appendix Page No. 26b). With respect to the Firefighter's Rule, the Court of Appeals declined to hold that being shot by a fellow officer is always, as a matter of law, a "normal, inherent, and foreseeable risk" of being a police officer. The Court of Appeals noted that no substantial discovery had been conducted,[1] and further discovery could adduce facts which showed that Liss' conduct was outside the "normal, inherent, and foreseeable risks" of police work. The Court of Appeals held that, consequently, denial of Liss' motion was appropriate "at [that] juncture" of the case:

> "[Liss] claims that being shot is a 'normal, inherent, and foreseeable risk' of being a police officer. While being shot is such a risk under many circumstances, we decline to hold that being shot by another officer is always, as a matter of law, a normal, inherent, and foreseeable risk' of being a police officer. According to [Lego's] allegations, [Liss] completely and unexpectedly disregarded all of his extensive police training during the dangerous, high-risk apprehension of a violent criminal suspect.

[1] Liss did not answer Detective Lego's Complaint prior to filing his claim of appeal and thus no discovery has been conducted in the case.

> Taking the allegations in the complaint as true, [Liss] violated numerous safety procedures, discharged his weapon without making sure other officers were out of the line of fire, and continued to fire after he had shot [Lego] in the back and the suspect lay mortally wounded on the ground. [Liss' summary] motion was filed prior to any substantial discovery and we are unwilling to hold that, if [Lego's] allegations are true, a jury could not reasonably find that [Liss'] actions were outside the 'normal, inherent, and foreseeable risks' of police work within the meaning of MCL 600.2966. Accordingly, the trial court did not err by denying [Liss'] motion for summary disposition under MCR 2.116(C)(7) at this juncture." (Michigan Court of Appeals Opinion dated March 27, 2014, p. 2; Appendix Page No. 27b)

The Court of Appeals held that, following discovery, the trial court would be required (assuming Liss again moved for summary disposition) to make a factual finding with respect to whether Lego's injuries arose pursuant to the "normal, inherent, and foreseeable risks" of police work and whether Liss therefore was entitled to governmental immunity under MCL 600.2966:

> "…[T]he factual findings necessary to determine whether [Liss] is entitled to summary disposition under MCR 2.116(C)(7) on the grounds of governmental immunity are reserved for the trial court, not a jury…Thus, if and when [Liss] again moves for summary disposition on the grounds of governmental immunity, the trial court must make factual findings sufficient to support its conclusion that [Lego's] injuries did or did not arise from the 'normal, inherent, and foreseeable risks' of being a police officer under MCL 600.2966." (Michigan Court of Appeals Opinion dated March 27, 2014, p. 2; Appendix Page No. 27b)

On May 8, 2014, Liss filed an application with this Court, seeking leave to appeal the Court of Appeal's ruling. In his application, Liss claimed that being shot by a fellow officer is a normal, inherent and foreseeable risk of police work **under any and all circumstances.** On June 2, 2014, Lego filed a response opposing the application. On December 22, 2014, this Court issued an order granting the application. The Court directed the parties to submit briefs addressing the following questions:

1. Whether, and to what degree, a defendant governmental actor's mental state or level of culpability is relevant to determining what constitutes normal, inherent and foreseeable risks of a firefighter's or police officer's profession under MCL 600.2966;

2. Whether the defendant's alleged violation of numerous departmental safety procedures is relevant to determining whether the shooting in this case was one of the normal, inherent and foreseeable risks of Lego's profession; and

3. In addressing the first issue, also address whether, and if so to what extent, MCL 600.2967 informs the interpretation of MCL 600.2966.

III. LAW & ARGUMENT

A. Standard of Review

Liss' summary disposition motion was brought pursuant to MCR 2.116 §§(C)(7) (claim barred by governmental immunity). The applicability of governmental immunity is a question of law that is reviewed *de novo* on appeal, *Pierce v. City of Lansing*, 265 Mich. App. 174, 176-177; 694 N.W.2d 65 (2005), citing *Mack v Detroit*, 467 Mich. 186, 193; 649 N.W.2d 47 (2002).

Also, a trial court's decision on a motion for summary disposition is reviewed *de novo* on appeal, *Id.*

The interpretation of a statue is a question of law which this Court reviews *de novo*, *Ameritech Mich. v. PSC (In re MCI)*, 460 Mich. 396, 413; 596 N.W.2d 164 (1999).

B. Legal Standard for Summary Disposition Motion

When reviewing a motion under MCR 2.116(C)(7), the court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, *Dextrom v Wexford Co.*, 287 Mich. App. 406, 429-433; 789 N.W.2d 211 (2010). If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether

there is a genuine issue of material fact, *Id*. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question of whether the claim is barred by immunity is an issue of law for the court, *Id*. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate and the court must deny the motion for the purpose of obtaining further factual development to enable the court to determine as a matter of law whether immunity applies, *Id*.

C. The Statute

In 1998, the Michigan Legislature codified the Firefighter's Rule by enacting 1998 PA 389 (M.C.L. §§600.2965 to 600.2967). The codified Rule abrogated the common law rule which existed to that point, M.C.L. §600.2965. The Rule provides that a safety officer may sue for injuries arising from the "normal, inherent, and foreseeable" risks of the officer's profession under certain circumstances:

> "(1) **Except as provided in section 2966,** a firefighter or police officer who seeks to recover damages for injury or death arising from the normal, inherent, and foreseeable risks of his or her profession while acting in his or her official capacity must prove that 1 or more of the following circumstances are present . . . ." M.C.L. §600.2967 (emphasis added)

The remainder of §2967 sets forth the circumstances under which the safety officer may recover, including, *inter alia*, where the officer's injury was caused by conduct which was grossly negligent, wanton, willful or intentional, §2967(1)(a)(i-iv). Recovery is further limited by §2966, which provides that a fire fighter or police officer may not recover in tort against governmental officers and employees for injuries which arise from the "normal, inherent, and foreseeable risks" of the firefighter's or police officer's profession:

> "The state, a political subdivision of this state, or a governmental agency, governmental officer or employee, volunteer acting on behalf of a government, and member of a governmentally created board, council, commission, or task force are immune from tort liability for an injury to a firefighter or police officer that arises from the **normal, inherent, and foreseeable risks of the firefighter's or police officer's profession**." M.C.L. §600.2966 (emphasis added)[2]

D. The Jurisprudence Of Michigan Courts Is That Conduct That Rises To The Level Of At Least Gross Negligence Is Almost Always Outside The "Normal, Inherent and Foreseeable" Risks

This Court has considered the Firefighter's Rule on four (4) previous occasions. The Firefighters' Rule was first adopted at common law[3] in *Kreski v Modern Wholesale Electric Supply Co*, 429 Mich. 347; 415 N.W.2d 178 (1987). *Kreski* was a consolidated appeal of two cases. In the first case, a police officer was injured when he fell through a building's trap door while investigating a burglary. In the second case, a firefighter was killed when a roof collapsed on him during a fire. The police officer and the firefighter's estate sued the respective property

[2] The House Legislative Analysis of 1998 PA 389 (House Legislative Analysis, HB 4044, November 23, 1998) indicates that the statute was enacted to address concerns that it was unfair to preclude safety officers from recovering against parties whose negligence caused the need for an officer's response to an incident and also for any and all injuries arising out of the "normal, inherent and foreseeable risks" of the officers' work. The Legislature intended to permit officers to recover under certain circumstances, including where the conduct causing injury was grossly negligent, wanton, willful or intentional. The bill underlying the statute provided for immunity for governmental agencies and actors for injuries to safety officers that arose from the normal, inherent and foreseeable risks of the officers' work, but the Legislative Analysis does not reflect any discussion on the part of the Legislature regarding what are normal, inherent and foreseeable risks. The bill did not affect the ability of safety officers to recover against both private and governmental actors for conduct which was outside the ambit of normal, inherent and foreseeable risks.

[3] M.C.L. §§600.2965 through 600.2967 are derived from the common-law firefighter's rule, House Legislative Analysis, HB 4044 (November 23, 1998). This Court has ruled that it is appropriate to refer to previously established common-law rules in analyzing a statute, *Nummer v Dep't of Treasury* , 448 Mich. 534, 544; 533 N.W.2d 250 (1995).

owners. This Court officially adopted the Firefighters' Rule and dismissed the suits, holding that, generally a fire fighter or police officer could not recover damages from a private party for injuries arising from the normal, inherent and foreseeable risks of their professions, based on the defendant's own negligence in the creation of the reason for the safety officer's presence, *Kreski*, p. 358.

In adopting the Firefighter's Rule, this Court enunciated several policy considerations underlying the Rule, primary among them the fact that the public, through taxes, pays to train and compensate firefighters and police officers to respond to dangerous situations, so firefighters and police officers should not be able to recover for injuries attributable to the negligence that requires their assistance. The Court also noted other policy considerations, including the fact that permitting safety officers to bring suit against negligent taxpayers would expose taxpayers to multiple penalties, it could be unreasonable to require property owners to maintain their premises in case of an unknown entry onto the property by police officers or firefighters carrying out their duty, and police officers and firefighters injured in the scope of their employment are eligible for workers' compensation benefits, *Kreski*, pp. 365-369.

Notwithstanding these policy concerns, this Court clarified in *Kreski* that the case did not define the precise boundaries of the Firefighter's Rule, and there could be exceptions to the Rule under circumstances that were not present in *Kreski*, including, *inter alia*, misconduct directed at the safety officer, *Kreski*, p. 371. The *Kreski* court ruled that not all risks encountered by a safety officer are inherent risks of the officer's profession and the Firefighter's Rule was not intended to afford an unconditional license for a defendant to expose a safety officer to those risks:

> "The [Firefighter's Rule] includes…those risks inherent in fulfilling…police or fire fighting duties. **Of course, this does not**

> **include all risks encountered by the safety officer. The [Rule] is not a license to act with impunity, without regard for the safety officer's well-being.**" *Kreski*, pp. 372-373 (emphasis added)

This Court next considered the common-law Firefighter's Rule in *Woods v Warren*, 439 Mich. 186; 482 N.W.2d 696 (1992). Sgt. Woods was a Centerline police officer who was injured when his car slid and crashed on an icy city road during a high-speed pursuit of a stolen vehicle. Woods brought a negligence action against the city for failing to properly de-ice the roadway. Following discovery, the trial court granted the city's motion for summary disposition on the basis of the Fireman's Rule. On appeal, the Court of Appeals reversed the trial court's order.

This Court granted leave to appeal and reversed the Court of Appeals' ruling. The *Woods* Court expanded the application of the Rule to include two separate categories of injuries: those deriving from the negligence causing the safety officer's presence and those stemming directly from the **normal risks** of the safety officer's profession, *Woods*, p. 196. In ruling that Sergeant Woods' injuries fell into the second category, the *Woods* Court cited *Kreski's* pronouncement that as a matter of public policy, the Rule should bar recovery for injuries resulting from risks that officers have been trained to expect and deal with:

> "The [*Kreski* Court's] comment applies equally to Sergeant Woods. He had received extensive training in maneuvering cars on slippery roads, and it was Sergeant Woods' duty to follow the stolen car." *Woods*, p. 191.

This Court revisited the Firefighter's Rule in *Gibbons v Caraway*, 455 Mich. 314; 565 N.W.2d 663 (1997). In *Gibbons*, a consolidated appeal, Gibbons was a police officer who sued the driver of a vehicle, Ms. Caraway, after being struck by the vehicle while directing traffic at an accident scene. The other case in the consolidated appeal, *Mariin v. Fleur, Inc.*, involved a police officer, Mariin, who sued a bar owner after being attacked by a patron that Mariin had arrested years before.

The trial court in Officer Gibbons' case denied the defendants' motion to dismiss based on the Firefighter's Rule and a panel of the Michigan Court of Appeals reversed. Citing this Court's opinion in *Woods, supra*, the Court of Appeals ruled that Gibbons was on duty when he was struck by the automobile driven by the defendant, the risk of being struck by a negligent motorist was inherent in the activity of directing traffic, and there were no exceptions to the Firefighter's Rule. In Officer Mariin's case, the trial court granted the defendant's motion to dismiss based on the Firefighter's Rule and the Court of Appeals reversed, holding that there was no showing that Mariin's presence at the bar was pursuant to his duties as a police officer.

After reviewing the policy considerations underlying the Rule enunciated in *Kreski*, this Court reiterated *Kreski's* pronouncement that the Firefighter's Rule was not a blanket proscription precluding recovery to a safety officer. This Court rejected the Court of Appeals' suggestion that there were no exceptions to the Fireman's Rule, and held that **individual exceptions to the Rule exist in appropriate situations as determined on a case-by-case basis**, *Gibbons*, 455 Mich. 322-323. Although there was no majority opinion in *Gibbons*, six justices concluded that the Firefighter's Rule did not preclude Officer Gibbons' action. The Court distinguished the case from the facts of *Woods, supra*, and held that application of the Firefighter's Rule to Gibbons' claim was inappropriate due to the fact that Ms. Caraway's conduct in running over Gibbons was possibly wanton, reckless or grossly negligent and thus there was a strong likelihood that her conduct was outside the normal, inherent and foreseeable risks:

> "In the case at bar, the risks inherent in Officer Gibbons' fulfillment of his police duties did not include all possible risks that could arise in that situation. Because 'the fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being,' the allegedly negligent operation of her automobile by defendant Caraway, which occurred after Officer Gibbons was on the scene and which is

> alleged to have been **wanton, reckless, careless, negligent, or grossly negligent**, precludes any ruling as a matter of law at this stage of the proceedings that Officer Gibbons' claims are barred by the fireman's rule. In light of the relevant principles underlying our adoption of the fireman's rule, we would hold that application of the rule under these circumstances is unjustified." *Gibbons*, pp. 325-326 (emphasis added)[4]

This Court considered the Firefighter's Rule most recently in *Harris-Fields v. Syze*, 461 Mich. 188; 600 N.W.2d 611 (1999).[5] In *Syze*, Ms. Syze's vehicle veered off the road, striking and killing Michigan State Trooper Fields while he was standing on the shoulder of the highway near a vehicle that he had stopped for a traffic violation. Field's widow sued Syze for wrongful death, alleging that Syze negligently operated her vehicle. Syze moved for summary disposition on the ground that Field's claim was precluded by the Firefighter's Rule. The trial court granted the motion; on rehearing, the Court of Appeals affirmed the trial court's decision, holding that the Firefighter's Rule barred Field's claim because there were no allegations that Syze acted with gross negligence.

This Court granted leave to appeal. The *Syze* Court noted that, because of the allegations of gross negligence in *Gibbons*, *supra*, it was not necessary for the *Gibbons* Court to decide whether ordinary negligence by a third party, subsequent to the safety officer's arrival, was sufficient to avoid application of the Firefighter's Rule. With respect to this issue, the *Syze* Court observed that the policy underlying the Firefighter's Rule was that safety officers should not be able to recover against the persons whose negligence required the officers' services. The Court ruled that, although Fields' lawsuit alleged only ordinary negligence, the Fireman's Rule did not bar Field's

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[4] In Officer Mariin's case, this Court affirmed the Court of Appeals' ruling that the Firefighter's Rule did not bar Mariin's claim. This Court held that the connection between Mariin's initial arrest of the bar patron and the patron's attack on him years later was too attenuated to conclude that the injury stemmed directly from Mariin's duties as a police officer, *Gibbons*, p. 328.

[5] *Syze* was decided after the Firefighter's Rule was codified, but the incident underlying the case occurred prior to the Rule being codified. The *Syze* Court noted that its ruling was reached with the intent of the ruling being in comity with the statute, *Syze*, pp.199-200.

action because the alleged negligence of Ms. Syze was unrelated to the events that brought Trooper Fields to the location where the injury occurred (the traffic stop), *Syze*, p. 197. The *Syze* Court appeared to hold that it was not relevant whether a third party's negligence occurred prior or subsequent to the officer's arrival at the scene *Syze*, p. 199, n. 9. The *Syze* Court's ruling regarding ordinary negligence did not disturb that part of the Court of Appeals' opinion in *Syze* which recognized *Gibbons'* holding that wanton or grossly negligent conduct is most likely outside the normal, inherent and foreseeable risks.

This Court has not previously considered the Firefighter's Rule in the context of what conduct on the part of a fellow safety officer falls outside the normal, inherent and foreseeable risks of a safety officer's work for purposes of §2966.[6] However, as indicated in the above cases decided by this Court that have considered normal, inherent and foreseeable risks generally, the jurisprudence of Michigan courts is that in determining whether the Rule applies, safety officers' claims should be analyzed on a case-by-case review of the specific circumstances of the officer's claim to assess whether the conduct complained of falls within the normal, inherent and foreseeable risks of the officer's duties.

[6] Appellant's Brief contends that the Court of Appeals in *Boulton v Fenton Twp*., 272 Mich. App. 456; 726 NW2d 733 (2006) "nicely summarized" the rationale of the Firefighter's Rule statute when it opined that "[G]iven the nature of their work, police officers and firefighters come into contact with other governmental employees under circumstances likely to result in injury much more often than people in other professions" (Appellant's Brief, p. 10). Appellant's Brief cites this statement by the *Boulton* court to suggest that the court believed the Firefighter's Rule should apply in virtually any situation where the defendant is a governmental actor. But, Appellant's Brief ignores the sentence following this statement in *Boulton*, in which the court acknowledged that "…[T]he immunity granted in MCL 600.2966 is limited to those injuries that arise as a result of **normal, inherent, and foreseeable risks** of the firefighters' and police officers' professions. **It does not prohibit recovery against a governmental entity for injuries that are not part of the risks encountered in providing public safety**." *Boulton*, p. 469 (emphasis added)

Also, under Michigan's jurisprudence, conduct which is at least grossly negligent is almost always outside the normal, inherent and foreseeable risks of a safety officer's work because this type of conduct exposes the officer to a risk of harm that he or she was not trained to expect or handle. As a result, the policy underlying the Firefighter's Rule enunciated in *Kreski*, that safety officers should not be able to recover for responding to dangerous situations that they are trained for and should expect to handle, is not promoted by applying the Rule to preclude officers from recovering for risks that were not reasonably foreseeable and which expose the officers to unreasonable dangers.

E. A Governmental Defendant's Mental State Can Be Relevant To Determining What Constitutes Normal, Inherent And Foreseeable Risks Under §2966; The Defendant's Level Of Culpability Is **Always** Relevant

1. A Governmental Defendant's Mental State Can Be Relevant

Appellant's Brief claims that Detective Lego "concedes" that Liss' shooting of him was "accidental" and that Liss did not intentionally shoot Lego (Appellant's Brief, p. 4). Lego's Complaint does not allege that Liss intended to shoot Detective Lego, but neither does it claim that Lego was shot as the result of a simple accident. The Complaint alleges that Liss committed numerous violations of safety procedures and recklessly discharged his weapon, due to a desire to "get in on the action" during the suspect's apprehension, then Liss continued to fire after shooting Lego in the back in an attempt to conceal his recklessness (Complaint, ¶30; Appendix Page No.6a).

But by attempting to frame the issue as one of intentional versus accidental (i.e., negligent) conduct, Liss misconstrues the proper factors to be considered in determining whether his conduct was a normal, inherent and foreseeable risk of police work. §2966 does not distinguish between intentional and negligent conduct, and in fact does not mention these

concepts at all. §2966 simply provides that recovery is precluded only by conduct which arises from normal, inherent, and foreseeable risks.[7] Furthermore, gross negligence and recklessness are distinct from intentional misconduct,[8] but that does not mean that conduct which constitutes gross negligence or recklessness cannot be outside the normal, inherent and foreseeable risks. As discussed at p. 14 above, this Court ruled in *Gibbons* that conduct which rises to the level of at least gross negligence is likely outside the normal, inherent and foreseeable risks:

> "In the case at bar, the risks inherent in Officer Gibbons' fulfillment of his police duties did not include all possible risks that could arise in that situation. Because 'the fireman's rule is not a license to act with impunity, without regard for the safety officer's well-being,' the allegedly negligent operation of her automobile by defendant Caraway, which occurred after Officer Gibbons was on the scene and which is alleged to have been **wanton, reckless…or grossly negligent**, precludes any ruling as a matter of law at this stage of the proceedings that Officer Gibbons' claims are barred by the fireman's rule." *Gibbons*, pp. 325-326 (emphasis added)

Appellant's Brief suggests that only intentional and wilful/wanton actions can constitute conduct which is outside the normal, inherent and foreseeable risks (Appellant's Brief, p. 14), but this contention is simply incorrect. *Gibbons* clearly held that negligent conduct can fall outside the normal, inherent and foreseeable risks, provided the conduct rises to the level of gross negligence. Consequently, it is immaterial whether conduct is intentional or grossly

[7] Sec. 2967 of the Firefighter's Rule, which applies to recovery against private parties, makes reference to both intentional misconduct and gross negligence but does not distinguish between the terms. Under §2967, recovery is permitted against a party even where the party's conduct occasioned the safety officer's presence, provided the conduct is at least grossly negligent (i.e., gross negligence, wanton, willful, intentional or criminal, §2967(1)(a)(i-v).

[8] "Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," *Odom v* Wayne County, 482 Mich. 459, 469; 760 N.W.2d 217 (2008).

negligent with respect to whether the conduct can give rise to an injury which is recoverable under §2966.

That is not to suggest that a governmental defendant's state of mind is not relevant to whether conduct is outside the normal, inherent and foreseeable risks. Depending on the circumstances of the case, state of mind can be quite relevant. For example, if an officer was to intentionally shoot his partner during a stake out due to some outside-the-workplace animus between the officers, the officer's intentional misconduct would certainly be a relevant factor to consider in determining whether his conduct was a normal, inherent and foreseeable risk of police stake outs.

On the other hand, if the officer reported to work drunk and as a result mistakenly shot his partner during the stake out, the officer's state of mind would be irrelevant with respect to whether the shooting was a normal, inherent and foreseeable risk, although (as discussed below in Sec. III-E-2) his violation of the rules in reporting for work intoxicated **would** be relevant. A determination of whether the Firefighter's Rule applies should be conducted on a case-by-case basis, *Gibbons*, pp. 322-323; a governmental defendant's state of mind is one of the factors that can be considered in deciding if the defendant's conduct was outside the normal, inherent and foreseeable risks, although this factor may not be relevant in every case. [9]

[9] Appellant's Brief contends that the defendant's state of mind "informs" the determination of normal, inherent and foreseeable risks when the conduct is intentional or willful/wanton, but not when the conduct is grossly negligent (Appellant's Brief, pp. 14-15). Although the relevance of the defendant's state of mind may be more readily apparent in cases alleging intentional or willful misconduct, it is incorrect to suggest that state of mind could never be relevant in a case alleging gross negligence. In the instant case, Lego's Complaint alleges gross negligence; nevertheless, in determining whether Liss' conduct was outside the normal, inherent and foreseeable risks, a relevant consideration is whether Liss willfully and deliberately disregarded his specialized training in order to "get in on the action" during the suspect apprehension.

2. A Governmental Defendant's Level Of Culpability Is Always Relevant

Unlike state of mind, which could be a relevant factor, a governmental defendant's level of culpability is always relevant in determining whether the conduct is outside the normal, inherent and foreseeable risks of police work. The reason for this is simple. Conduct that is merely negligent is never outside the normal, inherent and foreseeable risks because safety officers are specifically trained to expect and deal with that type of conduct, *Gibbons*, p. 331**.** Conversely, conduct that is at least grossly negligent is almost always (but not necessarily) outside the normal, inherent and foreseeable risks, because the conduct exposes safety officers to dangerous situations that exceed what they are trained for and should be expected to handle, *Id*. In order to determine whether conduct is outside the normal, inherent and foreseeable risks, there must be a determination that the conduct is at least grossly negligent. Thus, the defendant's level of culpability will always be a relevant factor in determining the normal, inherent and foreseeable risks.

Appellant's Brief argues that the "general rule" should be that the negligence, or even gross negligence, of a government actor is a known risk of any safety officer (Appellant's Brief, p. 9). This argument contradicts this Court's holding in *Gibbons* and the policy underlying the Firefighters Rule. As Justice Boyle explained in her concurring opinion in *Gibbons*, it is assumed that safety officers will encounter situations that subject them to negligent conduct, and because of their training the officers are expected to handle these situations. As a result, allowing officers to recover for injury caused by this ordinary negligence is unfair to society. On the other hand, grossly negligent, reckless or wanton conduct exposes the officer to risks that are not reasonably foreseeable and for which the officer was not trained to handle; consequently, it does not

promote the policy underlying the Rule to preclude recovery for injuries caused by conduct that is at least grossly negligent:

> "**Limiting this exception [to the Firefighter's Rule] to acts of wanton, reckless, or grossly negligent misconduct also appropriately balances the policy concerns underlying the rule**. Emergency situations and conditions such as those Officer Gibbons encountered are replete with distractions. At [the accident site in Gibbons' case], during evening rush hour traffic, one police cruiser and two tow trucks were at the scene with emergency lights flashing, two vehicles involved in the original accident were disabled, debris was being swept from the roadway, and Officer Gibbons was standing with a flashlight in the intersection directing traffic in conjunction with an operating traffic light. Faced with these circumstances, it is not unusual for traffic to come to a sudden stop or for cars to swerve to avoid obstructions in the roadway. **Although arguably negligent**, **such activity is a foreseeable risk of an officer's profession and, indeed, is often the very reason for which officers are dispatched to the scene of an accident. Officers are trained at taxpayer expense to handle these very situations. Under the circumstances of this case, public policy considerations support shielding citizens from a damage claim for injuries suffered by an officer as a result of the carelessness or ordinary negligence of an individual. They do not support shielding citizens from damage claims for injuries arising from their reckless, wanton, or grosssly negligent conduct."** *Gibbons*, p. 331 (emphasis added)

See also, e.g., *Kreski, supra*, holding application of the Firefighter's Rule appropriate because "…the potential for structural collapse is an inherent risk of fire fighting, and **one which fire fighters are trained to anticipate**…[I]t is common knowledge that burning buildings collapse, and the risk of that occurrence cannot be termed **hidden or unanticipated**." *Kreski*, p. 374 (emphasis added)

The policy rationale underlying the Firefighter's Rule, that a safety officer should not be able to recover because he or she is trained to confront the **normal** hazards of the job, is not promoted by applying the Rule when the officer is injured by conduct amounting to at least gross negligence. Whether a governmental defendant's culpability rises to the level of gross negligence

is always a relevant consideration in determining whether conduct is outside the normal, inherent and foreseeable risks under §2966.

3. §2967 Suggests That Conduct Which Is At Least Grossly Negligent Is Not Within The Normal, Inherent And Foreseeable Risks Under §2966

As discussed in this brief at p. 11 above, Sec. 2967 of the Firefighter's Rule was enacted to address the apparent harshness of the common-law rule, which precluded safety officers from recovering against parties whose negligence caused the need for an officer's response to an incident, even where the injurious conduct was grossly negligent, and also for any and all injuries arising out of the "normal, inherent and foreseeable risks" of the officers' work. Because §2967 pertains to private actors and §2966 deals with immunity of governmental officers, the two provisions are only tangentially related at best.

However, §2967 does inform the interpretation of §2966 in one significant respect. §2967 recognizes an exception to the Rule by permitting recovery against a private party, including those whose conduct necessitated the officer's presence, provided the conduct amounts to at least gross negligence, §2967(1)(a)(i-v). Preventing officers from recovering against private individuals whose negligence brought the officer to the scene was one of the main policy considerations underlying this Court's adoption of the common-law Firefighter's Rule, *Kreski,* pp. 365-369. §2967 represents an attempt by the Legislature to remedy the harsh impact of completely foreclosing recovery while still upholding the underlying policy that these individuals should not be sued. The policy is upheld by setting a high bar for purposes of filing suit; i.e., these individuals can only be sued where their conduct is at least grossly negligent.

Although §2967 does not concern conduct that is not within the normal, inherent and foreseeable risks, the provision suggests that the same balancing principle would apply to remedy the harsh impact of safety officers being unable to sue governmental actors under §2966,

even when the injurious conduct was at least grossly negligent. §2967 informs §2966 by suggesting that under §2966, governmental defendants can be sued for conduct that is outside the normal, inherent and foreseeable risks, but the determination that the conduct is outside the normal, inherent and foreseeable risks can only occur upon the plaintiff overcoming a high bar—i.e., conduct that is at least grossly negligent. Under both §2967 and §2966, a finding of at least gross negligence is necessary to sue two classes of defendants for which the Firefighter's Rule discourages liability. Informing §2966 in this way is in comity with the jurisprudence of this Court, that ordinary negligence is always within the normal, inherent and foreseeable risks.

F. Liss' Alleged Numerous Violations Of Safety Procedures Is Relevant To Determining Whether The Shooting In This Case Was Outside The Normal, Inherent And Foreseeable Risks Because The Violations Exposed Detective Lego To Risks That Were Not Reasonably Foreseeable

As discussed above, conduct that is at least grossly negligent is almost always outside the normal, inherent risks because this type of conduct exposes safety officers to unreasonable risks that they were not trained for and are not expected to handle. In other words, grossly negligent conduct exposes the officers to risks that were not foreseeable.

Foreseeability does not require a party to anticipate any and all occurrences under any and all circumstances. To be foreseeable, an occurrence must be **reasonably** foreseeable. "Foreseeability . . . depends upon whether or not a **reasonable** man could anticipate that a given event might occur under certain conditions", *Samson v. Saginaw Professional Bldg., Inc.*, 393 Mich. 393, 406; 224 N.W.2d 843 (1975). In the instant case, Liss' numerous violations of safety procedures is relevant to whether his conduct was outside the normal, inherent and foreseeable risks because the safety violations exposed Detective Lego to risks that were not reasonably foreseeable. Liss committed **numerous, egregious** violations of safety procedures and policies, including:

a. Leaving his position on the perimeter of the stake out operation and inserting himself in the stacking formation between Lego and the two officers behind Lego, without being instructed to do so and without notice to anyone;

b. Failing to communicate to Lego (by body contact) that he was behind Lego;

c. Failing to point the muzzle of his rifle upward and away from Lego;

d. Failing to keep his finger off the trigger and outside of the trigger guard of his weapon until he acquired a target and a clear line of fire;

e. Indulging in a reckless desire "to get into the action" by discharging his weapon without making certain Lego was out of his line of fire; and

f. Attempting to conceal his recklessness in shooting Lego by wildly firing his weapon two more times in the direction of Bronson as he lay unarmed on the ground after being shot by Lego. (Complaint, ¶¶ 20-25; Appendix, Page nos. 4a-5a).

A violation of any one of the safety procedures would have unreasonably increased the danger to those around Liss. By violating all the procedures he did, Liss made it a near-certainty that Lego, or another innocent party, was going to be shot. Taking the Complaint's allegations as true, Liss' actions can hardly be considered normal, inherent and foreseeable. Detective Lego and the other task force members received extensive training on how to confront and arrest an armed suspect in the safest way possible. As the Court noted in *Gibbons*, Lego was trained for, and was expected to handle, those types of dangerous situations. Detective Lego was **not** expected to handle being shot in the back by a fellow officer who unexpectedly disregarded his own extensive training in the middle of a suspect apprehension, due to the officer's reckless desire to get in on the action and get some "trigger time". Liss' violation of numerous, fairly basic arrest procedures exposed Detective Lego to a risk that was not a normal, inherent and foreseeable risk in every day law enforcement, let alone in operations conducted by the CRT and WNN task forces.

Contrary to the suggestion proffered by Appellant's Brief, the mere fact that Lego was performing a duty related to being a police officer at the time of injury does not mean that Liss' conduct was a normal, inherent and foreseeable risk of police work. In *Gibbons, supra*, this Court noted that the Firefighter's Rule did not apply based on the defendant's grossly negligent operation of her vehicle after Officer Gibbons had already arrived at the accident scene and was directing traffic. In her concurring opinion, Justice Boyle clarified that the Firefighter's Rule does not require an officer to assume the risk for all conceivable conduct which may develop after the officer was already engaged in carrying out his duties:

> "…[U]nless we conclude that by virtue of his profession an officer assumes the risk of injury from every irresponsible act, a line must be drawn. Officer Gibbons did not assume the risk of being injured by a **subsequent wanton, reckless, or grossly negligent act** of a third party by virtue of the fact that he was dispatched to the scene of an automobile accident anymore than he assumed the risk of being intentionally run down by a vindictive driver with a score to settle who happened to pass by as the officer was directing traffic." *Gibbons,* p. 330 (emphasis added)

In the instant case, considering that Liss did not even come upon the scene of the suspect apprehension until the take-down operation had already started, it was all the more unforeseeable that Liss would recklessly violate safety procedures by unexpectedly inserting himself in the stacking formation and shoot Lego in the back. This is not a situation where a defendant officer who was following at least some of the rules took a shot at a suspect but accidentally hit a fellow officer by virtue of being a poor shot. Liss should not have had his finger on the trigger of his rifle and he should not have had the muzzle of his rifle pointed at Lego's back. Had Liss adhered to even one of these two most basic safety rules, Liss would not have shot Detective Lego. Liss' actions were both grossly negligent and reckless and wanton as is evidenced by the fact that he **continued** firing his rifle wildly in the parking lot even after the suspect was down and dying.

The actions of Liss are so bizarre that no reasonable person, let alone someone who was aware of Liss' training, would ever consider such conduct to be normal or foreseeable.

Moreover, the suspect take down operation took place in the middle of a public parking lot where the Verizon store and other businesses were open to the public. Liss' wild shots ricocheted, one hitting a parked car and the others bouncing off the asphalt, fortunately not striking any shoppers in the vicinity or any of the officers who were positioned on the perimeter away from the action. Liss' recklessness placed Lego, as well as everyone else in the parking lot, at significant risk of being shot. It is difficult to see how the policies underlying the Firefighter's Rule would be promoted by not permitting Lego to recover for Liss' violating numerous safety procedures and wildly firing his AR-15 rifle in the parking lot.

Appellant's Brief claims that the Court of Appeals has "recognized" on multiple occasions that injuries arising out of the negligent actions of fellow officers who were committing policy violations are normal, inherent and foreseeable risks of police work (Appellant's Brief, p. 19). In support of this claim, Appellant's Brief cites three Court of Appeals decisions, *Boulton v Fenton Twp*., *supra*, *Chapman v Phil's County Line Service, Inc.* 2007 WL 1163211 (2007)(unpublished)(Appendix, Page No. 75a) and *McGhee v State Police*, 184 Mich App 484; 459 NW 2d 67 (1990).

To begin with, none of the cases cited by Appellant's Brief say anything about injuries caused by "fellow officers who were committing policy violations" constituting normal, inherent, and foreseeable risks of police work. In *Boulton*, Boulton was a sheriff's deputy who sued after he was struck and injured by a township-owned fire truck while investigating an accident scene. In *Chapman*, Chapman was a volunteer police officer who was riding as a passenger in a squad car driven by an Osceola County Sheriff's deputy. Chapman was injured

when the vehicle hydroplaned and crashed while the officers were responding to a burglary call. In *McGhee*, McGhee was a Detroit Police Officer who sued a state police trooper after being injured while attempting to assist the trooper in a high speed chase of a suspect vehicle that collided head-on with McGhee's police cruiser.

None of the three opinions held or even suggested that injuries caused by "fellow officers committing policy violations" are a normal, inherent and foreseeable risk of police work. The cases all involved traffic accidents, and the opinions simply held that the officers' injuries were normal, inherent and foreseeable risks of the traffic-related duties being performed by the officers in those cases. None of the opinions discussed whether policy violations were relevant to determining whether the defendants' conduct amounted to gross negligence and was outside the normal, inherent and foreseeable risks. The cases are not helpful in determining whether being shot in the back by a fellow officer who violated numerous safety procedures is a normal, inherent and foreseeable risk of police work.

No reported Michigan case has considered whether policy violations are relevant to determining if conduct is within the normal, inherent and foreseeable risks in the context of a shooting by a fellow officer. However, in *Rought v Porter*, 965 F.Supp. 989 (U.S. Dist. W.D. Mich. 1996), the federal Michigan Western District Court considered this exact issue. Deputy Rought was a Kalamazoo County detective assigned to a narcotics task force comprised of officers from various departments. Lieutenant Porter was a state police trooper assigned as commander of the task force. During the execution of a search warrant at a suspected drug house, Lt. Porter shot and seriously wounded Deputy Rought after mistakenly concluding that Rought was one of the suspected drug dealers. Testimony from other task force members present at the raid suggested that Porter discharged his weapon at least four times without first making certain

that he was shooting at an armed suspect, and not a fellow officer.

Deputy Rought sued Lt. Porter, who moved for summary judgment on several grounds, including his contention that he was immune from liability under Michigan's (then common-law) Firefighter's Rule. The district court denied Lt. Porter's motion. The *Rought* court held that the Firefighter's Rule did not apply because Porter clearly violated established department policy regarding use of deadly force when he shot Deputy Rought. The court held that being shot by an armed suspect or even by accidental gunfire from a fellow officer were normal risks associated with a police officer's work, but being shot by a fellow officer who violated deadly force rules was not a normal risk of police work:

> "…[The Firefighter's Rule] is limited by case law to 'injuries arising from the normal, inherent, and foreseeable risks of the chosen profession.' In this case, the application of the doctrine is questionable. While shooting by a felon or even an accidental discharge by another officer would appear to be 'normal' risks of a safety officer's duties, **it is much less clear that the risk of being shot by a fellow officer who is clearly not following constitutionally-mandated department policies regarding use of deadly force is a 'normal' risk of performing one's duties**. **Accordingly, summary judgment on this ground is denied**." *Rought*, p. 994 (citations omitted) (emphasis added).

In *Rought*, the district court ruled that it was reasonable to anticipate that in executing the search warrant, Deputy Rought could be shot by one of the occupants of the drug house or as the result of accidental gunfire by a fellow officer during the execution of the search warrant. These were normal risks associated with Rought's duties as part of the narcotics task force. However, like Trooper Liss's reckless violation of numerous safety procedures in the instant case, Lt. Porter's violation of departmental deadly force policies was not a normal risk of the narcotics task force officers' duties, and it exposed Deputy Rought to risks that were not reasonably foreseeable. Thus, the *Rought* court correctly held that Porter's conduct was not within the

normal, inherent and foreseeable risks, and the Firefighter's Rule did not bar Rought's claim. *Rought* is not binding authority on this Court, but prior to the instant matter it was the only reported case to consider the Firefighter's Rule in the context of the plaintiff being shot by a fellow police officer, in addition to the question of whether policy violations are relevant to determining if conduct is outside the normal, inherent and foreseeable risks, so the case is helpful with respect to the proper application of the Firefighter's Rule.

Appellant's Brief claims that Liss had to "react immediately" at the suspect apprehension and made a "split-second mistake in judgment" during a deadly force situation (Appellant's Brief, p. 21). Appellant's Brief ignores the fact that there has been no discovery conducted to support this claim. Taking the allegations in Lego's Complaint as true, far from making an "immediate" and "split-second mistake," Liss committed a **series of egregious violations** of the task forces' safety procedures and policies, culminating in Liss shooting Lego in the back and continuing to shoot even after Lego had been hit and the suspect lay dying. Moreover, even assuming *arguendo* that Liss did have to make "split second" decisions, that fact would not be dispositive of whether his conduct was grossly negligent, reckless and outside the normal, inherent and foreseeable risks.[10]

[10] Liss claims that "the officers'" (referring to his and Lego's) use of deadly force in apprehending the armed robbery suspect was justified (Appellant's Brief, p. 3), but there is no evidence that, given the allegations of Liss' numerous violations of safety procedures, **his decision** to use deadly force, and **the manner in which he implemented that deadly force**, was justified.

Appellant's Brief also contends that the danger of "accidental friendly fire"[11] is a "fact of life" (Appellant's Brief, p. 9) and to be shot by a fellow officer while apprehending an armed and dangerous criminal is a normal, inherent and foreseeable risk of police work (Appellant's Brief, p. 17). Appellant's Brief provides no support for these assertions. Detective Lego asks this Court to take judicial notice of statistics compiled by the Officer Down Memorial Page, Inc., a non-profit organization dedicated to honoring American law enforcement officers killed in action.[12] According to these statistics, there have been only twenty-one (21) instances of accidental gunfire deaths involving Michigan police officers from 1904 through 2013, a period of **109 years**. Of those 21 officers, five shot themselves and six were shot when they were mistaken for criminal suspects. Moreover, the most recent accidental shooting incident prior to 2013 occurred nearly 28 years before then, in 1986. The generalized possibility of being shot may be an inherent risk of police work, but being shot in the back as the result of a fellow officer's reckless violation of safety procedures during a criminal apprehension is **not** a normal or reasonably foreseeable risk of police work.

In any event, Liss' unsupported assertions about his "split-second mistakes," and shootings by fellow officers being commonplace events, simply emphasize that it is appropriate in this case for discovery to be conducted to enable the trial court to make a proper factual finding with respect to whether Liss' reckless disregard of numerous safety procedures exposed Detective Lego to risks that were not normal, inherent and foreseeable. In *Gibbons*, *supra*, this Court ruled that given the defendant's alleged grossly negligent, reckless or wanton conduct, a

[11] "Friendly fire" is not even an appropriate term to use when discussing the police operations conducted by the task forces. "Friendly fire" is a **military term** used to describe force employed against comrades during combat situations while attempting to attack the enemy, either by misidentifying the target as hostile, or due to errors or inaccuracy.

[12] The Officer Down Memorial Page is located on the Web at www.odmp.org.

finding that as a matter of law the conduct was within the normal, inherent and foreseeable risks was inappropriate at that stage of the proceedings, *Gibbons*, pp. 325-326. In the instant case, where no discovery has been conducted, the trial court correctly held that factual questions concerning Liss' alleged grossly negligent conduct precludes a ruling that §2966 barred Lego's claim.

Finally, Appellant's Brief claims that, pursuant to *Zalut v Andersen & Assoc.*, 186 Mich. App. 229; 463 NW2d 236 (1990), evidence of Liss' violation of safety procedures is only relevant to the issue of ordinary negligence and under *Maiden v Rozwood*, 461 Mich. 109; 597 N.W.2d 817 (1999), evidence of ordinary negligence does not create a material question of fact regarding gross negligence (Appellant's Brief, p. 19). This claim is incorrect and misleading. *Zalut* dealt with violations of administrative policies in the context of a breach of warranty and products liability claim. The instant case involves violations of departmental safety rules in a claim for gross negligence. The law in Michigan is that, with respect to governmental immunity, **gross negligence is characterized by a willful disregard of safety procedures**, *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010); *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Neither *Zalut* nor *Maiden* held or even suggested that evidence of safety violations is not relevant to proving a gross negligence claim.

IV. CONCLUSION & RELIEF REQUESTED

The Firefighter's Rule precludes recovery against governmental actors, but only for conduct that is within the normal, inherent and foreseeable risks of a safety officer's work. The policy underlying the Rule prohibits officers from recovering for injuries that result from risks that are foreseeable and for which the officers are trained to handle. Conduct that is at least grossly negligent is almost always outside the normal, inherent and foreseeable risks, because

that conduct exposes safety officers to dangerous situations that exceed what they are trained for and are expected to handle. The policy underlying the Firefighter's rule is not promoted by preventing officers from suing for injuries that result from risks that are not reasonably foreseeable and for which they are not trained.

It is possible that a governmental defendant's state of mind is relevant to determining whether his or her conduct is outside the normal, inherent and foreseeable risks, depending on the circumstances of the case. The defendant's level of culpability is always relevant, because if the conduct at issue does not rise to a level of at least gross negligence, the conduct necessarily is within the normal, inherent and foreseeable risks.

In the instant case, Liss' conduct amounted to gross negligence. The fact that a defendant's conduct constituted gross negligence does not *per se* establish that the conduct was outside the normal, inherent and foreseeable risks. However, in this case Liss' reckless disregard of numerous safety procedures is highly relevant to the question of whether his conduct was outside the normal, inherent and foreseeable risks. It was not reasonably foreseeable by Detective Lego, or anyone else for that matter, that Liss would commit numerous, egregious violations of safety procedures, resulting in Liss shooting Lego in the back. Consequently, Liss' conduct was not a normal, inherent and foreseeable risk of Lego's job. At a minimum, this case should be remanded to the trial court to permit the court to make a factual finding on this issue.

FOR THE REASONS discussed in this brief, Plaintiffs-Appellees respectfully request that this Honorable Supreme Court enter an order denying Defendant-Appellant's appeal.

Respectfully submitted,

Stefani & Stefani,
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By: __/s/ Michael L. Stefani_____
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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Judges Owens, Shapiro and Jansen

MICHAEL LEGO and
PAMELA LEGO,

Plaintiffs-Appellees,

vs.

MSP DETECTIVE SPECIALIST JAKE LISS,
in his individual capacity only,

Defendant-Appellant.

Supreme Court No. 149247
Court of Appeals No. 312392
Wayne Circ. Ct. No.12-7085-NO

APPENDIX TO APPELLEES' BRIEF ON APPEAL

STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

MICHAEL LEGO and
PAMELA LEGO,

Plaintiffs,

vs.

MSP DETECTIVE SPECIALIST JAKE LISS,
in his individual capacity only,

Defendant.

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PLAINTIFF'S RESPONSE OPPOSING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Plaintiffs Michael Lego and Pamela Lego, by and through their attorneys, Stefani & Stefani, Professional Corporation, request that the Court deny Defendant's Motion for Summary Disposition in its entirety.

In support of their Response, Plaintiffs rely on the facts and law stated in the attached Brief.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE WAYNE COUNTY CIRCUIT COURT

MICHAEL LEGO and
PAMELA LEGO,

Plaintiffs,

vs.

MSP DETECTIVE SPECIALIST JAKE LISS,
in his individual capacity only,

Defendant.

Case No. 12-007085-NO
Hon. John H. Gillis, Jr.

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BRIEF OPPOSING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

I. COUNTER-STATEMENT OF FACTS

Plaintiffs, Michael Lego ("Lego") and Pamela Lego are husband and wife. Lego began employment as a police officer with the Plymouth Township Police Department in 1993. Lego was later promoted to the rank of Detective Specialist. Starting in September 2008, Plymouth Township assigned Lego to a specialized task force known as the Western Wayne County Community Response Team ("CRT"). CRT is comprised of detectives from Plymouth Township, Northville Township, Canton Township, Wayne County Sheriff, and Michigan State Police ("MSP") troopers. CRT's primary responsibilities include surveillance of criminal suspects and fugitive apprehension in cases involving armed robbery and other violent crimes.

CRT is one of three separate task forces which operate under the direction of an "umbrella" agency, the Western Wayne Criminal Investigation Bureau. The other two task forces are Western Wayne Narcotics ("WWN") and Western Wayne Auto Theft. At the time of the incidents in this case, Defendant Jake Liss ("Liss") was a Michigan State Police trooper assigned to the WWN task force.

Officers assigned to the three task forces receive specialized and intensive SWAT-type training because they are often called upon to perform high risk operations such as building raids and take downs of vehicles occupied by armed and violent suspects. Officers assigned to the task forces are also trained and authorized to use specialized weapons such as M-4's and AR-15 assault rifles. Because the CRT, WWN and Auto task forces each have a limited number of officers assigned to it, officers from one task force are sometimes directed by their supervisors to assist one of the other task forces (Exhibit 1, Complaint, ¶¶ 9-11).

In October 2009, Lego and the other CRT detectives began investigating a series of armed robberies committed in and around Canton, Michigan. CRT's investigation developed information that an individual by the name of Lebron Bronson was the person committing the robberies. The investigation revealed that Bronson had an extensive and violent criminal history, including numerous armed robberies. For several days, CRT conducted surveillance of Bronson, following him as he drove to various locations. At the direction of the Western Wayne Criminal Investigation Bureau Commander, members of the WWN drug task force, including Defendant Liss, joined CRT in the Bronson investigation (Exhibit 1, Complaint, ¶15).

On October 29, 2009, CRT, along with members of WWN, followed Bronson to the parking lot of a Verizon Wireless store located in Plymouth Township. It was apparent to the officers that Bronson was about to perpetrate another armed robbery. After Bronson entered the

Verizon store, Detective Lego and two other officers positioned themselves in a stacking formation (i.e. one behind the other) against the wall of the building adjacent to the entrance of the Verizon store. Officer Lego, acting as point man, was armed with an M-4 assault rifle and closest in line to the Verizon store's entrance.

Defendant Liss arrived at the Verizon parking lot in his police vehicle a short time later. Since Lego and the other two officers had the Verizon store's entrance/exit covered, and additional officers had the other door covered and were relaying information, Liss in accordance with his training and proper tactics should have remained in his vehicle to block Bronson's escape if Bronson unexpectedly returned to his vehicle. (Exhibit 1, Complaint, ¶20). However, instead of remaining in his vehicle, Liss disregarded proper tactics and exited his vehicle carrying an AR-15 type rifle and ran up to Lego and the other two officers lined up against the side of the building without being instructed to do so and inserted himself between Lego and the two officers behind Lego. (Exhibit 1, Complaint, ¶20). After Liss positioned himself behind Detective Lego, he recklessly failed to follow the techniques he had been taught including making body contact with the officer in front of you when in a stacking formation, keeping your weapon's muzzle pointed in a safe direction and keeping your finger off the trigger and outside the trigger guard until engaging the target. (Exhibit 1, Complaint, ¶21).

At that point, Bronson suddenly exited the Verizon store still holding a handgun. Lego, who was the closest officer to Bronson, identified himself as a police officer and ordered Bronson to drop his weapon. Bronson ignored Lego's commands and instead raised his gun and pointed it at Lego, whereupon Lego fired two rounds from his weapon striking Bronson in the chest and causing Bronson to drop his pistol and fall to the ground mortally wounded. (Exhibit 1, Complaint, ¶23).

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As Detective Lego fired his weapon, Liss discharged his weapon without ensuring that Detective Lego was clear from his line of fire. The round from Liss's rifle struck Lego in the back of Lego's right shoulder. The round exited the front of Lego's shoulder, struck Lego's weapon, then struck Lego in both hands and then penetrated the left front fender of the suspect's vehicle. (Exhibit 1, Complaint, ¶24). Despite the fact that Bronson lay on the ground mortally wounded with his gun laying on the asphalt, Liss now standing on Lego's right side approximately 6 feet away from Bronson, wildly fired 2 more rounds at Bronson. Neither round struck Bronson instead they struck the asphalt pavement near Bronson and ricocheted through the air endangering the other officers and civilians in the area. (Exhibit 1, Complaint, ¶25).

As the result of being struck by Liss' bullet, Lego sustained serious injuries; two of the fingers on his left hand were shattered and had to be amputated. Because of nerve damage Lego remains in almost constant pain. He is no longer physically or psychologically capable of working as a police officer. He continues to suffer psychologically and is unable to perform any work.

II. LAW & ARGUMENT

A. Legal Standards for Summary Disposition Motion

Liss' Motion states that it is brought pursuant to MCR 2.116 §§(C)(7), (C)(8) and (C)(10).

MCR 2.116(C)(7) permits summary disposition where a claim is barred because of governmental immunity. When reviewing a motion under (C)(7), the court must accept the complaint's well-pleaded allegations as true and construe all reasonable inferences therefrom in favor of the non-moving party, *Diehl v. Danuloff,* 242 Mich.App 120, 123; 618 NW2d 83 (2000). Whether a claim is statutorily barred by immunity is a question of law, except where there are facts in dispute, *Maiden v. Rozwood,* 461 Mich. 109, 119, 597 N.W.2d 817 (1999).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. A motion brought under (C)(8) is tested on the pleadings alone, and all factual allegations contained in the complaint must be accepted as true with all reasonable inferences construed in favor of the non-moving party, *Id.*; *Simko v. Blake,* 448 Mich. 648, 654, 532 N.W.2d 842 (1995). The motion should only be granted if the claim is so clearly unenforceable as a matter of law that no factual development could justify a right of recovery, *Maiden,* pp. 119-120; *Smith v. Stolberg,* 231 Mich.App. 256, 258; 586 N.W.2d 103 (1998).

A motion under MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claims, *Harrison v Olde Financial Corporation,* 225 Mich.App. 601, 605; 572 N.W.2d 679 (1997). The court must consider the pleadings, affidavits and other admissible documentary evidence, and all reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party, *Corley v Detroit Bd. of Ed.,* 470 Mich 274, 278; 681 NW2d 342 (2004). The motion should only be granted where the non-moving party fails to present evidence establishing a genuine issue on any material fact, *Id.*

B. Liss Is Not Entitled To Immunity Because Being Shot By A Fellow Officer Who Unexpectedly Acts In A Grossly Negligent Manner Is Not A Normal, Inherent And Foreseeable Risk Of Police Work

Defendant's Brief argues that Plaintiffs' claims are barred by the Michigan Firefighter's Rule[1] since being shot is a "normal, inherent, and foreseeable risk in any police officer's profession" (Defendant's Brief, p. 7). But, this argument is not the law in Michigan. In the first place, no reported Michigan case has held that being shot is a normal, inherent and foreseeable risk of police work. Moreover, Detective Lego was not shot by a criminal suspect in the line of

[1] The "Firefighter's Rule" provides that governmental officers and employees are immune from tort liability for an injury to a fire fighter or police officer that arises from the "normal, inherent, and foreseeable risks of the firefighter's or police officer's profession", MCL §§600.2966-2967.

duty or even as a result of a simple accidental weapon discharge by a fellow officer. Detective Lego was shot due to Defendant Liss acting in a grossly negligent manner, by unexpectedly disregarding his extensive SWAT training (and his fellow officers' safety) in the middle of a high-risk apprehension of a violent criminal suspect, in order to play "cowboy". This is not a "normal, inherent and foreseeable" risk of police work.

As noted above, no reported Michigan state cases have addressed whether being shot is a normal, inherent and foreseeable risk of police work, let alone being shot by a highly-trained fellow officer inexplicably breaching training and safety protocols in the middle of a suspect take-down operation. However, *Rought v Porter,* 965 F.Supp. 989 (W.D. Mich. 1996), a case applying Michigan law and decided by the U.S. District Court for the Western Michigan District, is instructive. Deputy Rought was a Kalamazoo County narcotics detective assigned to a multi-jurisdictional undercover narcotics task force comprised of officers from various southwest Michigan departments and the state police. Porter was a state police lieutenant assigned as commander of the task force. During the execution of a search warrant by the task force at a suspected drug house, Lieutenant Porter shot and seriously wounded Deputy Rought after Rought emerged from behind some trees and Porter mistakenly concluded that Rought was one of the suspected drug dealers. Testimony from other task force members present at the raid suggested that Porter discharged his weapon at least four times without first making certain that he was shooting at an armed suspect, and not a fellow officer.

Porter moved for summary judgment on several grounds, including his contention that he was immune from liability under the Michigan Firefighter's Rule. The district court noted that Lt. Porter's conduct appeared to transcend a simple accidental shooting of a fellow officer by virtue of the fact that Porter had disregarded department policy regarding use of deadly force; the

court denied the summary judgment motion, ruling that the Michigan Firefighter's Rule did not apply since being shot by a fellow officer who clearly violated department safety rules and protocols regarding use of deadly force was not a "normal" risk of police work:

> "…[The Michigan Firefighter's Rule] is limited by case law to 'injuries arising from the normal, inherent, and foreseeable risks of the chosen profession.' In this case, the application of the doctrine is questionable. While shooting by a felon or even an accidental discharge by another officer would appear to be 'normal' risks of a safety officer's duties, **it is much less clear that the risk of being shot by a fellow officer who is clearly not following constitutionally-mandated department policies regarding use of deadly force is a 'normal' risk of performing one's duties. Accordingly, summary judgment on this ground is denied**." *Rought*, p. 994 (citations omitted) (emphasis added).

In the instant case, accepting the Complaint's allegations as true and construing them favorably to Plaintiffs (as the Court is required to do for purposes of the instant motion), Liss acted in a grossly negligent manner by disregarding his extensive and specialized training, by leaving his position without authorization and inserting himself in the stacking formation behind Lego, failing to exercise proper weapon control and failing to ensure that Lego was out of his line of fire.. In fact, because Liss was a highly trained specialist, Lego and the other officers reasonably should have had a greater expectation that Liss was not likely to suddenly and inexplicably disregard that training, as a result of a reckless desire to "get in the action". Liss' action were not a "normal, inherent and foreseeable risk" of police work, and certainly not a normal or foreseeable risk for the specialized operations conducted by the CRT and WNN task forces.

The cases cited in Defendant's Brief, *Kreski v. Modern Wholesale Elec. Supply Co.* 429 Mich. 347; 415 N.W.2d 178 (1987) and *Boulton v Fenton Twp.*, 272 Mich.App. 456; 726 N.W.2d 733 (2007), do not help Defendant's argument. First, neither case addresses whether

being shot is a normal, inherent and foreseeable risk of police work, let alone being shot by a highly-trained fellow officer who unexpectedly breaches training protocols in the middle of a high-risk operation. In *Kreski*, the plaintiff police officer was injured when he fell through a trap door while investigating a burglary; in *Boulton*, the plaintiff officer was struck by a city-owned fire truck while investigating an accident scene. Moreover, both *Kreski* and *Boulton* involved claims of only ordinary negligence, unlike the instant case where Plaintiffs have alleged gross negligence on the part of Defendant Liss.[2]

Contrary to Liss' suggestion, the Firefighter's Rule is not a blanket prescription of immunity for governmental employee. In *Kreski*, the Michigan Supreme Court ruled that:

> "The [Fireman's Rule] includes…those risks inherent in fulfilling the police or fire fighting duties. Of course, this does not include all risks encountered by the safety officer. The [Rule] is not a license to act with impunity, without regard for the safety officer's well-being. The [Rule] rule only insulates a defendant from liability for injuries arising out of the inherent dangers of the profession." *Kreski*, pp. 373-373.

In the instant case, even if it was correct that being shot is a "normal, inherent and foreseeable" risk of police work, being shot as a result of the grossly negligent actions of a highly-trained officer who blatantly disregards that training in the middle of a dangerous SWAT-type operation is not. Similar to the *Rought* court, this Court should decline to apply the Firefighter's Rule.

C. There Is No Evidence That A Joint Venture Existed Or That Lego And Liss Were Co-employees In A Joint Venture

Defendant's Brief claims that WWCI, WWN and CRT constitute a "joint venture" and

[2] Under Michigan law, gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results," *Odom v. Wayne Co*, 482 Mich. 459, 469; 760 NW2d 217 (2008), quoting M.C.L. §691.1407(7)(a). Liss' summary disposition motion does not contest Plaintiffs' claim that Liss' actions constituted gross negligence.

that as members of the respective task forces, Detective Lego and Defendant Liss were "co-employees" of that joint venture. As a result, according to Liss, the exclusive remedy provision of the Michigan Workers' Disability Compensation Act ("WDCA") precludes Plaintiffs' lawsuit (Defendant's Brief, pp. 7-8).[3] Contrary to Liss' claim, there is no evidence that a joint venture existed, let alone that Lego and Liss were co-employees in that joint venture.

Rought v Porter, supra, is helpful. In *Rought*, Lt. Porter sought summary judgment on the grounds that he was entitled to the protection of the exclusive remedy provision of the WDCA because the drug task force was a joint venture and he was a co-employee of Rought on the task force. Citing *Berger v Mead*, 127 Mich. App. 209; 338 NW2d 919 (Mich. App. 1983),[4] the *Rought* court held that summary judgment on whether the WDCA's exclusive remedy provision applied to Porter was improper because, unlike in *Berger*, there was no formal written agreement establishing the task force and in fact, Porter had presented no evidence that the participating police agencies had ever agreed to undertake a joint venture. The *Rought* court ruled that under these circumstances, a jury could disagree whether the evidence proved the existence of a joint venture:

> "…[T]he Michigan Court of Appeals in the case of [*Berger*] held that a state multi-jurisdictional police task force which operated under a formal operating agreement constituted a 'joint venture'… As noted by plaintiffs, the defendant here, unlike the defendant in [*Berger*], is not relying on a formal written agreement which indicates an intention of police departments to undertake a joint

[3] The WDCA provides generally that when an employee is injured in the performance of his duties, his sole remedy against his employer is an award of disability compensation damages, M.C.L. §418.131. In addition, the Act bars an employee from suing a co-employee for injuries sustained during employment, M.C.L. §418.827.

[4] In *Berger*, the Michigan Court of Appeals held that there is a "joint venture" for worker's compensation purposes whenever there is (1) an agreement indicating an intention to undertake a joint venture; (2) a joint undertaking; (3) a contribution of skills or property by the parties; and (4) community interest and control over the subject matter of the enterprise, *Berger*, 127 Mich. App at.214–15. The Court of Appeals also held that a court must employ a four factor 'economic reality' test before concluding that the employees in question were co-employees of the joint venture: (1) the right to control; (2) the payment of wages; (3) the right to hire, fire, and discipline and (4) the performance of the duties, *Berger*, 127 Mich. App at. 217.

> venture. What is more, the defendant has failed to file any evidence (other than that there was in fact a task force which was operating on the day in question) to support his assertion that the participating departments had formed an agreement to undertake a joint venture and met the other requirements of a joint venture under the case law." *Rought*, p. 995.

The *Rought* court further held that even if a joint venture did exist, summary judgment was still improper because a genuine fact issue existed on question of whether Rought and Porter were co-employees of the joint venture since the task force neither paid Rought nor had authority to discipline him:

> "...In this case, unlike in [*Berger*], only two of the four [economic reality test] factors are met since the task force neither paid Rought's wages nor had authority to discipline him. Also, there is some testimony that the participating departments' participation in the task force 'changed like the wind.' In light of such factual disputes, a reasonable jury could draw conflicting conclusions from the evidence such that summary judgment is inappropriate. Accordingly, summary judgment on the ground of the Worker's Disability Compensation Act is denied." *Id.*

In *Rought*, the court ruled that summary judgment was inappropriate because of a lack of evidence that Rought and Porter were co-employees in a joint venture. Similarly, in the instant case, there is no evidence that the participating police agencies agreed to operate a joint venture between CRT, WWN and WWCI, or that Detective Lego was a co-employee with Liss in that joint venture. Defendant's Brief suggests that an alleged WWN "Interagency Agreement" (Attachment 1 to Defendant's Exhibit A) and Western Wayne Community Response Team Bylaws (Attachment 2 to Defendants' Exhibit A) show that CRT and WWN are part of a joint venture. **However, a simple reading of the documents shows that there is no language in the WWN agreement which mentions CRT, nor any language in the CRT bylaws which pertains to WWN.** This "evidence" falls far short of establishing the existence of a joint venture between WWN and CRT or that Lego and Liss were co-employees in a joint venture.

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The CRT bylaws do not even suggest that Lego was an employee of CRT under the *Berger* economic reality test, let alone a co-employee in a joint venture with Liss. Under the section entitled "Compensation, Liability and Insurance", the CRT bylaws state that the participating agencies pay the salaries of their members on the task force, so according to the bylaws CRT does not pay Detective Lego's wages. In fact, Liss acknowledges Detective Lego's wages were paid by Plymouth Township and not CRT (Defendant's Brief, p. 11), a fact which militates against both the existence of a joint venture and Lego's employment with Liss in that joint venture. Also, the bylaws simply state that CRT members serve under the direction of the CRT Unit Commander. Although the bylaws suggest that the Unit Commander may have input on accepting or removing members to and from CRT, there is no suggestion that the Unit Commander or CRT has the authority to hire, fire or discipline Lego as a police officer. The documents proffered by Liss fail to show that Lego was an employee of CRT, much less a co-employee with Liss in a joint venture.

In fact, the only "evidence" submitted by Liss which suggests any relationship at all between CRT and WWN is the affidavit of MSP Detective Lieutenant Darryl Hill (Exhibit 1 attached to Defendant's Exhibit A), who is apparently the new commander of WWN. According to Hill's affidavit, CRT is operated pursuant to the WWN Interagency Agreement. Setting aside for a moment that Hill's affidavit does not prove the existence of a joint venture, Hill's claims are both self-serving and completely without evidentiary support, and it would be inappropriate for the Court to rule on this issue without affording Plaintiffs an opportunity to conduct discovery. In *Colista v Thomas,* 241 Mich.App. 529; 616 N.W.2d 249 (2000), the Michigan Court of Appeals ruled that a grant of summary disposition is inappropriate where discovery is not complete with respect to facts which might affect the outcome of a suit:

> "...[W]e reject [the] claim that summary disposition should have been granted under MCR 2.116(C)(10) because there is no genuine issue of material fact...**Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed**." *Colista*, pp. 537-539 (internal citations omitted)(emphasis added).

In the instant case, discovery is not merely incomplete, as it was in *Colista;* it hasn't even started. Plaintiffs should have the opportunity to cross-examine Hill on his affidavit and to conduct other discovery to refute Liss' claim that a joint venture exists and that Lego was a co-employee with Liss in that joint venture. Defendant's Brief relies on the Michigan Court of Appeals' decision in *Berger v Mead.* But in *Berger,* the Michigan Court of Appeals ruled that it was inappropriate to decide whether the WDCA exclusion provision applies where (as here) discovery is incomplete and there is insufficient evidence for the Court to make a determination. *Berger* supports this Court denying Defendant's motion because discovery in the instant case has not even commenced.

Berger was a City of Royal Oak police officer assigned to a multi-jurisdictional task force comprised of officers from various Oakland County police agencies. Berger sued several of the officers to recover for injuries sustained when he was shot during a training exercise conducted by the task force. The defendant officers moved for summary judgment on the grounds that they were "co-employees" in a "joint venture" with Berger (the task force), and as such were entitled to the protection of the exclusive remedy provision of the WDCA. The trial court granted summary disposition.

Berger appealed to the Michigan Court of Appeals, 87 Mich.App. 361; 275 N.W.2d 2 (1978)("*Berger I*"). In *Berger I*, the Court of Appeals reversed the trial court and remanded the WDCA claim on the grounds that discovery in the case had not been completed and the evidentiary record was insufficient for the court to conclude as a matter of law that a joint

venture existed and that Berger was a co-employee. On remand, and after discovery was concluded, the trial court once again entered summary judgment for the defendant officers, and Berger appealed again. In the second appeal, 127 Mich. App. 209; 338 NW2d 919 (Mich. App. 1983) ("*Berger II*"), the Michigan Court of Appeals upheld the trial court's ruling that the WDCA precluded Berger's suit, holing that the record following the completion of discovery was sufficient for the trial court to determine that Berger's claims were precluded by the WDCA, *Berger*, 127 Mich. App at 217–18.

Berger militates towards denying the instant motion. In *Berger I*, the Michigan Court of Appeals reversed the trial court's ruling that Officer Berger was a co-employee in a joint venture and remanded the case until sufficient discovery was conducted for the court to make a reasoned decision on that issue. It was only after discovery was concluded that the Michigan Court of Appeals ruled five years later in *Berger II* that Berger and the defendant officers were co-employees in a joint venture. In the instant case, there has been **no discovery** conducted, let alone sufficient evidence adduced that a joint venture existed and Detective Lego was a co-employee with Liss in that joint venture.

The Court should not grant summary disposition on the WDCA exclusion issue where, as here, (1) there is no evidence that a joint venture existed and Lego and Liss were co-employees and (2) documents submitted by Liss suggest exactly the opposite. In fact, the Court should not even consider the issue because Plaintiffs have not been afforded an opportunity to conduct discovery.

D. There Is A Cognizable Claim Against Liss On Which To Premise The Consortium Claim

Finally, Defendant's Brief argues that Mrs. Lego's consortium claim must be dismissed because there is no legally cognizable claim against Liss (Defendant's Brief, p. 12). For the

reasons discussed in the above sections, there is a cognizable claim on which the consortium claim is premised and Defendant's argument is without merit.

III. CONCLUSION

FOR THE REASONS stated above, Plaintiffs request that the Court deny Defendant's motion in its entirety and award Plaintiffs their costs incurred in defending against the motion, including a reasonable attorney fee.

Respectfully submitted,

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STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT FOR WAYNE COUNTY

MICHAEL LEGO, ET AL.,

Plaintiff,

v

Case No. 12-007085-NO

MSP DETECTIVE SPECIALIST JAKE LISS,

Defendants.

_____/

MOTION HEARING

BEFORE **THE HONORABL JOHN H. GILLIS, JR.,** CIRCUIT COURT JUDGE

Detroit, Michigan - Thursday, August 16, 2012

APPEARANCES:

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REPORTED BY: MARY E. LOEWY, CSMR 3743
Official Court Reporter

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Detroit, Michigan

Thursday, August 16, 2012

THE COURT: Michael Lego and Pamela Lego versus MSP Detective Specialist Jake Liss in his individual capacity only. Appearance for the Plaintiff, please.

MR. RIVERS: Good morning, your Honor, Frank Rivers, on behalf of the Plaintiffs.

MR. FROEHLICH: Assistant Attorney General, Joe Froehlich on behalf of Defendant.

THE COURT: Okay.

It's Defendant's motion for summary disposition. This is a police shooting following an armed robbery, go ahead.

MR. FROEHLICH: That's correct, your Honor.

They're apprehending an armed robber, he makes a move like he's gonna shoot, the Plaintiff shoots the robber, the Defendant accidentally shoots Plaintiff.

There's no dispute that it's an accident. They're both members of a violent crimes task force that regularly encounters armed individuals, apprehends them, engages in all kinds of dangerous activities in the law enforcement capacity.

It's our position that this claim is barred by the Firefighters Rule and the exclusive remedy provision of the Worker's Comp Act, as the Firefighters Rule.

The statute provides that a police officer defendant is immune from liability where the plaintiff's injury is caused by something that's normal, inherent and foreseeable in the profession.

Now, these police officers are members of a violent crimes task force, regularly apprehending --

THE COURT: But they had different employers.

The Plaintiff is what -- worked for the City of Plymouth, was it or?

MR. RIVERS: Plymouth Township, your Honor.

THE COURT: Plymouth Township, and the Defendant worked for the State Police, so they had separate employers --

MR. RIVERS: That's correct, your Honor.

THE COURT: Well, it goes by where their paycheck comes from. They had separate employers, I'm just telling you that.

MR. FROEHLICH: Okay.

But that -- even if that's the case, that goes to the board comp issue, it's not a relevant factor in the Firefighters Rule issue.

Only the fact that they're -- the Defendant is a police officer and the Plaintiff is a police officer, doesn't matter where they're employed.

They're a violent crime task force. They regularly encounter armed individuals, apprehend them. They're confronted with a situation where an armed robber is about to shoot. The Plaintiff himself discharges his weapon, kills the guy, the Defendant discharges his weapon and accidentally shoots the Plaintiff. That's an inherent foreseeable risk engaged in this type of law enforcement activity.

The Plaintiffs has cited this route case out of the Western District, it's just not applicable here. That was an intentional shooting, that was a police officer who shot what he thought was a bad guy intentionally, turned out to be another police officer, it's totally different from this case.

In this case, it was an accident. And in this case, deadly force was warranted as evidenced by the fact that the Plaintiff himself shot this guy.

And their whole thing is that these violations and policy, if you look at their complaint, they say the Defendant violated internal policies, and that's grossly negligent.

But, the fact is there are dozens of cases in

Michigan that say violation of a policy or even a statute is only evidence of ordinary negligence, not gross negligence.

So here, where even assuming a policy was violated, we're talking about a rapidly evolving situation that confronted with an armed robber, he acts like he's gonna shoot, the Plaintiff shoots the armed robber and the Defendant accidentally shoots the Plaintiff. That's an inherent risk of doing this type of police work.

THE COURT: Okay, Plaintiff's position?

MR. RIVERS: Yes, your Honor, thank you.

Your Honor, a trained officer breaking his position, inserting himself in a formation in the midst of a apprehension of a violent criminal and then discharging his weapon counter to his training and counter to department policy is not a normal and inherent foreseeable risk of police work.

Your Honor, the statute, the Firefighters Rule of Statute doesn't define normal inherent foreseeable rise, it's taken on a case-by-case basis.

The only case, your Honor, that has addressed the Michigan Firefighters Rule in the context of a shooting by a fellow officer is in fact the route case.

In that case, your Honor, the court found

that in that situation where the defendant officer shot the plaintiff officer in violation of department policies, the Firefighters Rule did not apply.

With all due respect to Brother Counsel, I think he's being a little bit disingenuous when he tries to draw distinction between an intentional shooting in that case and an accidental shooting here.

The point is simply that the officers in question were shooting at something and hit something they weren't supposed to hit, which was a fellow officer.

Your Honor, in this case, the Firefighters Rule is not a blanket prescription for an officer or anyone to do anything and then say that the plaintiff officer is precluded from recovery.

In this case, your Honor, taking our allegations as true, Officer Liss acted in a very negligent, grossly negligent fashion, did something totally unexpected to Officer Lego and that resulted in Officer Lego being shot.

The Firefighters Rule does not apply here. That's not a normal inherent and foreseeable risk of law enforcement.

THE COURT: Okay.

In this case, the Plaintiff shot the armed

robber as he came out of the Verizon store and he was on the ground dead when the State Police officer shot at the armed robber and accidentally hit the Plaintiff in this case.

I think there's a question of fact on the gross negligence issue because the person was already on the ground, number one; and number two, the Plymouth Township Police were already in line to apprehend the man when he came out of the store and the State Police officer came up later. So, the Court will deny the motion.

MR. RIVERS: Thank you, your Honor, we'll submit an order.

MR. FROEHLICH: Your Honor, would you indulge me to make a short record on the other issue?

THE COURT: No.

I don't allow records after I make my ruling.

MR. FROEHLICH: Okay, thank you, your Honor.

MR. RIVERS: Thank you, your Honor.

(Proceedings concluded)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

I, Kimberly Kucel, Certified Electronic Recorder, typed and transcribed this proceeding, and hereby certify that the foregoing pages are inclusive and comprise a full, true, and correct transcript at the proceeding in this matter on Thursday, August 16, 2012.

Kimberly Kucel

Kimberly Kucel, CER 6521

STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL LEGO and PAMELA LEGO,

Plaintiffs-Appellees,

v

JAKE LISS,

Defendant-Appellant.

UNPUBLISHED
March 27, 2014

No. 312392
Wayne Circuit Court
LC No. 12-007085-NO

MICHAEL LEGO and PAMELA LEGO,

Plaintiffs-Appellees,

v

JAKE LISS,

Defendant-Appellant.

No. 312406
Wayne Circuit Court
LC No. 12-007085-NO

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right from the trial court order denying his motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity pursuant to MCL 600.2966. We granted defendant leave to appeal the denial of summary disposition under MCR 2.116(C)(8) and (10) based on the workers' compensation exclusive remedy provision, MCL 418.131(1). For the reasons set forth below, we affirm.

Plaintiff and defendant are both police officers; plaintiff is employed by Plymouth Township and defendant by the Michigan State Police. During their work on an anti-crime task force in western Wayne County, defendant fired his weapon at a crime scene and wounded plaintiff.

Because defendant is a government employee, MCL 600.2966 rather than MCL 600.2967 applies. *Boulton v Fenton Twp*, 272 Mich App 456, 461; 726 NW2d 733 (2006). The "Fireman's Rule," codified in part as MCL 600.2966, provides that government employees are

immune from tort liability for an injury to a firefighter or police officer "that arises from the normal, inherent, and foreseeable risks" of the profession. The plain language of MCL 600.2996 does not, however, provide blanket governmental immunity from suits by firefighters or police officers.

Defendant claims that being shot is a "normal, inherent, and foreseeable risk" of being a police officer. While being shot is such a risk under many circumstances, we decline to hold that being shot by another officer is always, as a matter of law, a normal, inherent, and foreseeable risk of being a police officer. According to plaintiff's allegations, defendant completely and unexpectedly disregarded all of his extensive police training during the dangerous, high-risk apprehension of a violent criminal suspect. Taking the allegations in the complaint as true, defendant violated numerous safety procedures, discharged his weapon without making sure other officers were out of the line of fire, and continued to fire after he had shot plaintiff in the back and the suspect lay mortally wounded on the ground. Defendant's motion was filed prior to any substantial discovery and we are unwilling to hold that, if plaintiff's allegations are true, a jury could not reasonably find that defendant's actions were outside the "normal, inherent, and foreseeable risks" of police work within the meaning of MCL 600.2966. Accordingly, the trial court did not err by denying defendant's motion for summary disposition under MCR 2.116(C)(7) at this juncture. See *Dextrom v Wexford Co*, 287 Mich App 406, 428-433; 789 NW2d 211 (2010).[1]

Our decision is supported by that of the federal district court in *Rought v Porter*, 965 F Supp 989 (WD Mich, 1996). In that case, the plaintiff was a Kalamazoo County narcotics officer assigned to a multi-jurisdictional task force led by the plaintiff, a Michigan State Police Lieutenant. *Id.* at 990. During the execution of a search warrant, the defendant shot the plaintiff three times. *Id.* at 991. The defendant had not been listening to his radio, where a fellow officer had been stating that he believed the individual the defendant fired at to be the plaintiff. *Id.* Another fellow officer testified that the defendant fired four times at the plaintiff without first determining that he was shooting at an armed suspect, not a fellow officer. *Id.* at 991.

The *Rought* plaintiff brought various claims and the defendant moved for summary disposition in part arguing that he was protected by governmental immunity. *Id.* at 994. Under facts sufficiently similar to those in the instant case, the court denied the motion, stating:

> The [Fireman's] Rule makes a great amount of sense in that the injuries usually suffered by police officers are expected in a dangerous profession and are usually

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[1] Under *Dextrom*, the factual findings necessary to determine whether defendant is entitled to summary disposition under MCR 2.116(C)(7) on the grounds of governmental immunity are reserved for the trial court, not a jury. 287 Mich App at 431-432. Thus, if and when defendant again moves for summary disposition on the grounds of governmental immunity, the trial court must make factual findings sufficient to support its conclusion that plaintiff's injuries did or did not arise from the "normal, inherent, and foreseeable risks" of being a police officer under MCL 600.2966.

> compensated through the worker's compensation system. Nevertheless, the Rule is limited by case law to "injuries arising from the normal, inherent, and foreseeable risks of the chosen profession." *McGhee v State Police Dep't*, 184 Mich App 484, 486; 459 NW2d 67 (1990). In this case, the application of the doctrine is questionable. While shooting by a felon or even an accidental discharge by another officer would appear to be "normal" risks of a safety officer's duties, it is much less clear that the risk of being shot by a fellow officer who is clearly not following constitutionally-mandated department policies regarding the use of deadly force is a "normal" risk of performing one's duties. Accordingly, summary judgment on this ground is denied. [*Id.* (citation omitted).]

Defendant also sought summary disposition under MCR 2.116 (C)(8) and (C)(10) pursuant to the workers' compensation exclusive remedy provision. The Worker's Disability Compensation Act (WDCA), MCL 418.301 *et seq.*, is an employee's exclusive remedy against an employer for personal injury, except as the result of an intentional tort. MCL 418.131(1). This exclusive remedy provision applies to actions against coemployees as well as employers. MCL 418.827(1); *Harris v Vernier*, 242 Mich App 306, 310; 617 NW2d 764 (2000). It does not apply to actions against a defendant who was not the plaintiff's employer or coemployee. *Kenyon v Second Precinct Lounge*, 177 Mich App 492, 499; 442 NW2d 696 (1989).

The issue is whether plaintiff and defendant were coemployees in a joint venture. See *Berger v Mead*, 127 Mich App 209, 214-219; 338 NW2d 919 (1983). A joint venture has the following six elements: an agreement showing an intention to undertake a joint venture, a joint undertaking, a single project, involving the contribution of skills or property by the parties, involving community interest, and control over the subject matter. *Id.* at 215; see also *Hathaway v Porter Royalty Pool, Inc*, 296 Mich 90, 103; 295 NW 571, amended 296 Mich 733 (1941).

Employment is determined by the economic reality test, which considers control of duties; payment of wages; the ability to hire, fire, and discipline; and the performance of duties as an integral part of the employer's business toward accomplishing a common goal, with no single factor being more important. *Farrell v Dearborn Mfg Co*, 416 Mich 267, 276; 330 NW2d 397 (1982); *Nichol v Billot*, 406 Mich 284, 299; 279 NW2d 761 (1979). Whether it is an issue of law for the trial court or an issue of fact for the jury depends on whether facts are at issue or whether different inferences could be reasonably drawn from the facts. *Nichol*, 406 Mich at 306, quoting *Flick v Crouch*, 434 P2d 256 (Okla, 1967); see also *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 690; 594 NW2d 447 (1999). Dual employment is possible. *Id.*; *Berger*, 127 Mich App at 217.

In the present case, the parties were not members of the same task force; rather, defendant and members of his task force were assisting plaintiff's task force. Defendant offered an affidavit suggesting that one task force operated under the umbrella of the other; however, that assertion was not reflected by the written agreements. Moreover, plaintiff and defendant were employed by different government entities – Plymouth Township and the State of Michigan. Factual questions remained regarding whether the parties were engaged in a joint venture and were coemployees. Therefore, the trial court did not err by denying defendant's motion for summary disposition under MCR 2.116(C)(8) and (C)(10).

Affirmed. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Douglas B. Shapiro